A5-025

IN THE SUPREME COURT
STATE OF GEORGIA

MAY 14 2007

ANTHONY MANN,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S07A1043
	*	
DEPARTMENT OF CORRECTIONS, ET AL.,	*	
	*	
	*	
Appellee	*	

BRIEF OF APPELLEE ON BEHALF OF THE DEPARTMENT OF CORRECTIONS, THE STATE OF GEORGIA, AND PROBATION OFFICER JOSHUA BARNETTE

THURBERT E. BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

JOSEPH DROLET 231000
Senior Assistant
Attorney General

Please serve:

Joseph Drolet
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 657-3983

IN THE SUPREME COURT
STATE OF GEORGIA

ANTHONY MANN,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S07A1043
	*	
DEPARTMENT OF CORRECTIONS, ET AL.,	*	
	*	
	*	
Appellee	*	

BRIEF OF APPELLEE ON BEHALF OF THE DEPARTMENT OF CORRECTIONS, THE STATE OF GEORGIA, AND PROBATION OFFICER JOSHUA BARNETTE

THURBERT E. BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

JOSEPH DROLET 231000
Senior Assistant
Attorney General

Please serve:

Joseph Drolet
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 657-3983

IN THE SUPREME COURT
STATE OF GEORGIA

ANTHONY MANN,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S07A1043
	*	
DEPARTMENT OF CORRECTIONS, ET AL.,	*	
	*	
	*	
Appellee	*	

BRIEF OF APPELLEE ON BEHALF OF THE DEPARTMENT OF CORRECTIONS, THE STATE OF GEORGIA, AND PROBATION OFFICER JOSHUA BARNETTE

PART ONE

STATEMENT OF THE CASE

Appellant, a convicted child molester, filed a complaint for declaratory judgment and injunction seeking relief from the requirements of O.C.G.A. § 42-1-15, the law that prohibits convicted sex offenders from living or being employed in proximity to places where minors are likely to congregate (R. 4-19). A hearing was held on the matter on October 2, 2006 and on January 17, 2007 the trial court

denied the relief requested (R. 133-136). From that order the Appellant brings this appeal (R. 1-3).

STATEMENT OF FACTS

Appellant was convicted in the State of North Carolina for two separate offenses of Indecent Liberties with a Child (R. 4, 5; T. 4, 12, T. Plaintiff's Exhibit 1). The victims were both under 16 years old and one was no more than eleven years old at the time of the offense (T. 12-13). As a condition of his probation, Appellant was subject to "special conditions for sex offenders" including not being around any child under the age of eighteen alone, not working with children, and registering as a sex offender (T. 13, T. Plaintiff's Exhibit 1).

Appellant previously litigated similar issues in this Court. In *Mann v. State*, 278 Ga. 442 (2004), this Court upheld sex offender residency provisions in the face of Appellant's challenge that the statute was an *ex post facto* law and an unconstitutional "taking" of Appellant's property.

Appellant now owns a home with his wife (T. 6-7, T. Plaintiff's Exhibit 3). A day care facility has opened near his home (T. 7, 8). As a convicted sex offender,

Appellant may not reside within 1,000 feet of the day care facility (T. 8). Appellant conceded that his house has value unaffected by the Sex Offender statute and that he could visit the property, rent the property or sell the property (T. 15-16).

Appellant is also a 50% owner of a corporation that operates a barbeque restaurant (T. 9). Appellant is employed at the restaurant although the corporation could hire others to perform the operations of the business (T. 20, 23). A child care facility has opened within 1,000 feet of the business (T. 10). The business has never made money and its lease will expire in October of 2007 (T. 14, 15; T. Plaintiff's Exhibit 2). The lease also contains an escape clause that may permit Appellant to terminate the lease (T. 17, 18; T. Plaintiff's Exhibit 2).

Additional facts will be proved as need in Part Two of this Brief.

PART TWO

ARGUMENT AND CITIATON OF AUTHORITIES

ENUMERATIONS ONE AND TWO

O.C.G.A. § 42-1-15 DOES NOT UNCONSTITUTIONALLY TAKE APPELLANT'S RESIDENCE OR BUSINESS INTEREST

As he did in 2004, Appellant, a convicted sex offender, again challenges the law in regard to his proximity to child care facilities. O.C.G.A. § 42-1-15(a) provides that no registered sex offender "shall reside . . . within 1,000 feet of any child care facility . . ." O.C.G.A. § 42-1-15(b)(1) provides that no registered sex offender "shall be employed . . . by any business or entity that is located within 1,000 feet of a child care facility . . ." In his previous visit to this Court, Appellant was a renter; now he is a homeowner and has a part corporate ownership in a business. Child care facilities have opened near both the house and the business.

"[W]e must presume that acts of the General Assembly are constitutional, and never declare them void 'except in a clear and urgent case.'" *Service Employees International Union v. Perdue*, 280 Ga. 379, 380 (2006).

"When a statute is under constitutional attack, this Court must presume it to be constitutional until it is established that the statute 'manifestly infringes upon a constitutional provision or violates the rights of the people.'" *Cooper v. State*, 277 Ga. 282, 285 (2003).

To sustain a facial challenge, one must show that the statute, on its face, can not operate constitutionally, regardless of the facts or at the very least it can not operate constitutionally in a large fraction of the cases in which it applies. See *State of Georgia v. Jackson*, 269 Ga. 308, 311 (1998). In the Appellant's previous challenge to this statute, in *Mann v. State*, 278 Ga. 442 (2004), this Court treated the case as a facial challenge and rejected that challenge. To the extent Appellant is raising the same challenge, with the same parties, in the very same court, the *res judicata* doctrine would appear to apply. *Karen, Inc. v. Auto-Owners Insurance Company*, 280 Ga. 545 (2006). *Res judicata* bars relitigation of matters that were or could have been litigated in an earlier action. *Nally v. Bartow County Grand Jurors*, 280 Ga. 790 (3)(2006).

Appellant's attack on the statute now appears to be an "as applied" challenge to the statute rather than a "facial" challenge. To the extent Appellant raises his challenge to the statute "as applied" to his present

personal situation, that challenge must also fail. In regard to the property Appellant owns, he can show no more than the inconvenience of being unable to reside on the property. Nothing in the sex offender statute lowers the value of his property; nothing prevents him from permitting others to use it; nothing prevents him from visiting it; nothing bars his ability to lease it; nothing bars his sale of the property; nothing requires that the property be sold. As noted by this Court in Appellant's previous case, an otherwise valid regulation would be problematic only if it "denies all economically beneficial or productive use of land" or "interferes with reasonable investment-backed expectations." *Mann v. State*, at 443; See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992)(physical taking of property); See also *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)(regulatory restriction on property). Appellant has demonstrated no such problem here. Appellant may use his land for virtually any economically beneficial or productive use he wishes (other than as his personal residence or place of employment). In no way does the law interfere with reasonable investment-based expectations. The value of the property may rise with the market, totally unencumbered by any interference or restrictions caused by the sex offender

registry. There may be inconvenience, but there is no "taking" of Appellant's property. This is particularly true when Appellant's inconvenience is contrasted with the substantial weight of the public interest underlying the sex offender registry requirements. As noted by this Court in Appellant's previous case, the law acts as a safeguard against encounters between minors and convicted sex offenders by requiring at least a 1,000 foot distance between places where the former congregate and the latter reside. *Mann v. State*, at 444.

The "bundle of rights" that constitute property ownership is not seriously impacted by the destruction of one strand of that bundle. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). The statute is not a regulation that denies all economically beneficial or productive use of land nor does it deny Appellant's use of all of the strands that make up the bundle of rights possessed as the property owner. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Where there is no denial of all economically beneficial or productive use of land, but the regulation impacts some use of it, the analysis described in *Penn Central Transportation* is instructive.

The first consideration is the economic impact of the regulation on the landowner. Here, to the extent Appellant

owns his home, the economic impact is minimal. The home retains value and that value still belongs to Appellant. He may sell the property, keep the property, visit, or conduct any lawful activities on the property. Next, a review of the extent the regulation interferes with a reasonable investment-backed expectation fails to show that Appellant has lost any substantial economic value. The final and most important consideration is the purpose of the governmental regulation. Here, the purpose of the statute is to protect the public, and specifically minors, from sex offenders who have been deemed to have a higher rate of recidivism than other classes of offenders. See *Smith v. Doe*, 538 U.S. 84, 103 (2003). This protection derives from a legitimate state interest in light of the finding that "[s]ex offenders are a serious threat in this Nation." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003), citing *McKune v. Lile*, 536 U.S. 24, 32 (2002).

The statute prevents registered sex offenders from residing near locations where children are likely to congregate, thereby reducing the risk that they will re-offend against innocent child victims. Additionally, the restriction reduces the likelihood that such offenders will have ready and permanent access to locations where they can place children under constant predatory surveillance. In

light of the high risk of recidivism posed by sex offenders and the imprecision of determining what measures best prevent recidivism, the Georgia General Assembly acted properly and within its authority by enacting this regulatory scheme for the purpose of protecting the public from harm. The statute rationally advances the State's interest in protecting children, and decisions regarding statutory restrictions such as proximity or length of application are more appropriately within the purview of elected policymakers of the State. The Georgia General Assembly is empowered to weigh the benefits and burdens of this restriction and to make legislative choices of pursuing the State's interest in protecting children from those who would do them harm by the best means available. See *Doe v. Miller*, 405 F.3d 700, 714-16 (8th Cir. 2005).

Finally, the purpose of the Takings Clause is "to prevent the government from forcing a few people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole, *Palazzolo v. Rhode Island*, 533 U.S. at 618, citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Here, Appellant does not bear a "public" burden; the burden is appropriately his to bear as a result of his convictions for sexual offenses and crimes against children.

Governmental regulations, by definition, involve the "adjustment of rights for the public good" and at times this adjustment will curtail some potential for use or economic exploitation of private property. *Andrus*, 444 U.S. at 65.

Turning to the Appellant's business interest, the argument for a "taking" is even more tenuous. The Appellant does not own the property where his barbeque business is now situated nor does his corporation have a long-term lease (there is less than one year remaining on the three year lease). It also appears (and Appellant concedes in his brief) that Appellant may easily terminate the lease relationship. Furthermore, Appellant is simply an employee of the barbeque business (a corporation in which he is a one-half owner). From the evidence presented by Appellant, it is obvious that the corporate business can continue without his employment at this location. Appellant may retain his ownership interest in the corporation; he is simply barred from being employed by the corporation at this particular place. Other persons may work for the corporation at that location. The corporation, Ballard's Southern Style Barbeque, Inc., is unaffected by the sex offender statute.

Furthermore, Appellant has failed to show that his share in this business has any value. He admitted that the business lost money last year and will lose money this year as well. There has been no evidence presented by Appellant that the barbeque business will ever make money. Given that Appellant does not own the property where the barbeque business is located and has shown no expectation of an economically viable business, it is difficult to imagine how there could be a taking.

ENUMERATION THREE

O.C.G.A. § 42-1-15 PERMITS APPELLANT TO TRANSACT BUSINESS AND TO ENTER INTO CONTRACTS AND IS NOT UNCONSTITUTIONALLY INFIRM

Appellant, without benefit of any evidence whatsoever, suggests that in the future he will be unable to engage in any business or enter into any contracts. Appellant speculates about future problems he may encounter, complains about matters for which he has failed to show any standing, and makes unsupported allegations about the future effects of O.C.G.A. § 42-1-15.

Appellant may certainly transact business, accept private employment, and contract with whomever he pleases. The statute, on its face, certainly does not restrict the

Appellant as he suggests. This code section only prevents him from residing or being employed within 1,000 feet of where children (like his previous victims) congregate. Appellant speculates that he may be banished to the life of a hobo or vagabond. He has presented no evidence whatsoever that he has suffered this fate nor has he presented any evidence that the statute on its face would have this effect on him or on others.

To the extent Appellant is arguing that the broader legislative scheme is unconstitutional, his claim is without merit. See *Smith v. Doe*, 538 U.S. 84 (2003); *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003); *Doe v. Miller*, 405 F. 3rd 700 (8th Circuit, 2005); and *Thompson v. State*, 278 Ga. 394 (2004).

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

JOSEPH DROLET 231000
Senior Assistant Attorney General

Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404)657-3983

IN THE SUPREME COURT
STATE OF GEORGIA

ANTHONY MANN,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S07A1043
	*	
DEPARTMENT OF CORRECTIONS, ET AL.,	*	
	*	
	*	
Appellee	*	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Brief of State Appellees by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed, upon:

Stephen Bailey Wallace, II
P.O. Box 565
Jonesboro, Georgia 30237

Michael L. Smith
Clayton County Attorney
112 Smith Street
Jonesboro, Georgia 30236

James E. Dearing
730 Peachtree Street, N.E.
Suite 1055
Atlanta, Georgia 30308

This 14th day of May, 2007.

Joseph Drolet
Sr. Assistant Attorney General